Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–200–05 OF 2013
LIM YEE LAN, ROHANA YUSUF AND ABANG ISKANDAR ABANG HASHIM JJCA
13 JANUARY 2015

Damages (Personal Injury or Death) — Assessment — Whether trial judge adhered to accepted principles of assessment and normal practice in making award — Whether no reason for appellate court to interfere with award made — Whether trial judge had also exercised discretion properly in determining amount of costs to be awarded to successful party

The instant appeal was against the quantum of damages awarded by the High Court in favour of the appellant infant who was a victim of medical negligence at the first respondent's hospital. The appellant suffered quadriplegic spastic cerebral palsy arising from birth and treatment at the hospital. The respondents admitted liability on the day of trial and the hearing proceeded only on the issue of damages. In the instant appeal, the appellant contended that the trial court's award of RM1,193,442.39 in damages was manifestly low as many heads of damages claimed for were disallowed. These included the cost of nursing care provided to the appellant by her mother, claims for special nutritious food, medical care at a private hospital and for future medical equipment including a vehicle for disabled users, the cost of employing two foreign maids to care for the appellant, training and education costs for the care-giver, claims for respite care, pain and suffering resulting from future necessary surgery and cost of holidays. The appellant was also dissatisfied with the RM100,000 in costs awarded by the trial judge saying that she had sought RM115,000 as costs for the liability proceedings and that because the respondent only admitted liability on the day of the trial, the full costs asked for should have been awarded.

Held, dismissing the appeal:

(1) It was trite that an appellate court would not interfere with the decision of a trial judge unless it was satisfied the judge had acted on a wrong principle of law or had made a wholly erroneous estimate of the damages suffered either due to an omission to consider relevant matters or due to consideration of irrelevant matters. The purpose of an award of damages was to provide monetary compensation for the harmful consequences

suffered by the injured. Damages for personal injuries were not punitive and still less a reward. It was compensatory and not to punish the defendant or even to make him a lesson for others (see paras 4 & 5).

(2) The trial judge in the instant case adhered to the principles in the assessment of damages. She had at the forefront of her mind the compensatory principle and had generally conducted her assessment on that and other principles. The total damages awarded had to be taken as a whole instead of particularising it item-by-item. On the facts and circumstances of this case, the award of damages was correctly made relying on accepted legal principles and normal practice (see paras 6, 41 & 42).

(3) The court agreed with the trial judge that though the agreement on liability took place only on the day of trial, it resulted in lightening the burden of the appellant and her counsel and shortened the days of trial. The trial judge also took into account the fact that the same expert witnesses would have been involved if the trial on liability had proceeded. She had exercised her discretion properly under O 59 of the Rules of Court 2012 and had taken into account the relevant facts in awarding the sum of RM100,000 for costs. There was no good reason for this court to disturb her exercise of discretion in this regard (see para 40).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap kuantum ganti rugi yang diawardkan oleh Mahkamah Tinggi memihak perayu bayi yang menjadi mangsa kecuaian perubatan di hospital responden pertama. Perayu menghidapi quadriplegic spastic cerebral palsy berbangkit daripada kelahiran dan perubatan di hospital tersebut. Responden-responden mengaku liabiliti pada hari perbicaraan dan pendengaran diteruskan hanya atas isu ganti rugi. Dalam rayuan ini, perayu berhujah bahawa award mahkamah perbicaraan sebanyak RM1,193,442.39 dalam ganti rugi adalah terlalu rendah kerana kebanyakkan jenis ganti rugi yang dituntut tidak dibenarkan. Ini termasuk kos penjagaan kejururawatan yang diberikan kepada perayu oleh ibunya, tuntutan-tuntutan untuk makanan berkhasiat khas, penjagaan perubatan di hospital persendirian dan untuk pelengkapan perubatan masa hadapan termasuk kenderaan untuk pengguna yang cacat, kos menggajikan dua pembantu asing untuk menjaga perayu, kos latihan dan pendidikan untuk penjaga, tuntutan-tuntutan untuk penjagaan penangguhan, kesakitan dan penderitaan akibat daripada pembedahan yang perlu untuk masa hadapan dan kos percutian. Perayu juga tidak puas hati dengan kos RM100,000 yang diawardkan oleh hakim perbicaraan dengan menyatakan bahawa dia memohon RM115,000 sebagai kos untuk liabiliti prosiding dan oleh kerana responden hanya mengaku liabiliti pada hari perbicaraan, kos sepenuhnya yang dipohon patut diawardkan.

Diputuskan, menolak rayuan:

(1) Adalah nyata bahawa mahkamah rayuan tidak akan campur tangan dengan keputusan hakim perbicaraan kecuali ia adalah puas hati hakim telah bertindak atas prinsip undang-undang yang salah atau telah membuat kesilapan sepenuhnya anggaran ganti rugi yang dialami sama ada akibat kepada peninggalan untuk mempertimbangkan perkara relevan atau akibat pertimbangan terhadap perkara yang tidak relevan. Tujuan award ganti rugi adalah untuk memberikan pampasan kewangan untuk akibat mudarat yang dialami oleh orang yang cedera. Ganti rugi untuk kecederaan peribadi tidak punitif dan masih ganjaran. Ia adalah pampasan dan bukan bertujuan untuk menghukum defendan atau membuatkan dia sebagai teladan untuk yang lain (lihat perenggan 4 & 5).

(2) Hakim perbicaraan dalam kes ini mematuhi prinsip-prinsip penaksiran ganti rugi. Beliau telah mempertimbangkan prinsip pampasan dan menjalankan penaksirannya atas prinsip tersebut dan prinsip-prinsip lain. Jumlah ganti rugi yang diawardkan diambil kira sebagai keseluruhannya bukan menyenaraikannya satu persatu. Berdasarkan fakta dan keadaan kes ini, award ganti rugi diberikan dengan betul bergantung kepada prinsip sah dan amalan biasa (lihat perenggan 6, 41 & 42).

(3) Mahkamah bersetuju dengan hakim perbicaraan bahawa walaupun perjanjian ke atas liabiliti hanya dibuat pada hari perbicaraan, ia mengambil keputusan untuk meringankan beban perayu dan peguamnya dengan memendekkan hari-hari perbicaraan. Hakim perbicaraan juga mengambil kira fakta bahawa saksi-saksi pakar yang sama akan terlibat jika perbicaraan atas liabiliti diteruskan. Beliau telah menggunakan budi bicaranya secara betul di bawah A 59 Kaedah-Kaedah Mahkamah 2012 dan mengambil kira fakta relevan dalam mengawardkan jumlah RM100,000 untuk kos. Tidak terdapat alasan untuk mahkamah ini campur tangan pelaksanaan budi bicaranya dalam perkara ini (lihat perenggan 40).]]

Notes

For cases on assesment, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 211–221.

Cases referred to

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771 (refd)

Chai Yee Chong v Lew Thai [2004] 2 MLJ 465, CA (refd)

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her

father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785, CA (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Ramanaidu a/l C Simansalom v Kerajaan Malaysia & Ors [2011] MLJU 1199, HC (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, FC (refd)
Yang Salbiah & Anor v Jamil Harun [1981] 1 MLJ 292, FC (refd)

Legislation referred to

Rules of Court 2012 O 59
Civil Law Act 1956 s 28

Appeal from: Suit No 21-229-2009 (High Court, Shah Alam)

M S Dhillon (Khabir Dhillon with him)(P S Ranjan & Co) for the appellant.
Nik Mohd Noor bin Nik Kar (Jabatan Peguam Negara, Malaysia) for the respondent.

Rohana Yusuf JCA (delivering judgement of the court):

[1] The appellant's appeal concerns the assessment of damages ordered by the High Court at Shah Alam on 16 April 2013, resulting from a claim on medical negligence. The appellant, an infant suing through her father as her next friend, suffered from Quadriplegic Spastic Cerebral Palsy (QSCP) arising from child birth and treatment at the respondent's hospital. At the date the matter was set for trial at the High Court, liability was agreed between parties and the trial proceeded only on the issue of damages. At the end of the trial the learned High Court judge awarded a total sum of RM1,193,442.39 as damages together with interest and costs.

[2] The appellant contended that the sum awarded by the learned judge was manifestly low. Dissatisfied with some of the items of damages not taken into account, the appellant lodged this appeal which came before us on 24 February 2014. We have unanimously dismissed the appeal and our reasons are set out below.

[3] For convenience, we produce *in extenso* the damages as ordered by the learned High Court judge:

Gantirugi Khas

1.1	perbelanjaan perjalanan dan penginapan	RM2,100
1.2	kos dan perbelanjaan penjagaan	Tidak dibenarkan
1.3	kos pakaian khas, peralatan dan bahan lain	Tidak dibenarkan

1.4	kos rehabilitasi	RM9,600
Gantirugi Pra-Bicara		
1.5	perbelanjaan perjalanan	RM6,000
1.6	perbelanjaan medikasi	Tidak dibenarkan
1.7	kos penjagaan	RM15,980
1.8	kos baju khas, lampin, lampin pakai buang dan krim	RM2,380
1.9	kos percutian	Tidak dibenarkan
1.10	kos nutrisi tambahan dan makanan khas	Tidak dibenarkan
1.11	kos fisioterapi dan rehabilitasi	RM1,960
1.12	kos rawatan tradisional	RM3,600
1.13	kos kenderaan	RM40,495.72
1.14	kos pengubahsuaian rumah	RM26,666.67
Gantirugi Am		
1.15	kesakitan dan penderitaan dan kehilangan ameniti kehidupan	RM300,000
Gantirugi Am Masa Depan		
1.16	kos rawatan dan kemasukkan Hospital (RM1033x20tahun)	RM20,660
1.17	kos fisioterapi, terapi pekerjaan dan terapi percakapan (RM560 x 12 bulan x 20 tahun)	RM134,400
1.18	kos membeli, membaiki dan penyelenggaraan alat bantuan mekanikal dan peralatan	RM136,000
1.19	kos pembantu rumah (RM800 x 12 bulan x 20 tahun)	RM192,000
1.20	kos penjagaan oleh ibu bapa dan keluarga (RM300 x 12 bulan x 20 tahun)	RM72,000
1.21	kos latihan dan pendidikan penjaga	Tidak dibenarkan
1.22	kos penjagaan berkala	Tidak dibenarkan
1.23	kos pembelian, penyelenggaraan dan pengubahsuaian kenderaan	RM89,000
1.24	kos pengubahsuaian rumah	RM80,000
1.25	kos baju khas, lampin, lampin pakai buang dan krim (RM140 x 12 bulan x 20 tahun)	RM33,600
1.26	kos pembedahan masa depan	RM25,000
1.27	kesakitan dan penderitaan bagi pembedahan masa depan	Tidak dibenarkan
1.28	kos penyediaan makanan berkhasiat	Tidak dibenarkan

1.29	kos penginapan dan saraan hidup apabila Inas mencapai umur 18 tahun	Tidak dibenarkan
1.30	kos pendidikan dan latihan khas	Tidak dibenarkan
1.31	kos percutian	Tidak dibenarkan

Faedah

1.32 faedah pada kadar 4% bagi gantirugi khas dan tarikh kejadian 14 May 2007 hingga tarikh penghakiman 16 April 2013;

1.33 faedah pada kadar 5% bagi gantirugi am bagi kesakitan dan penderitaan dan bagi gantirugi pra-bicara dari tarikh penyampaian writ 17 Ogos 2009 hingga tarikh penghakiman;

1.34 faedah selepas penghakiman pada kadar 5% daripada 16 April 2013 hingga ke tarikh pembayaran jumlah gantirugi; dan

Kos

1.35 Kos sebanyak RM100,000 bagi pihak plaintif.

PRINCIPLE IN ASSESSING DAMAGES AND APPELLATE INTERFERANCE

[4] It is trite law that an appellate court will not interfere with the decision of a trial judge unless it is satisfied that the judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered either due to an omission to consider relevant materials or an admission of irrelevant considerations (*Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22).

[5] The purpose of award of damages is to provide monetary compensation for the harmful consequences suffered by the injured. Damages for personal injuries cannot be punitive and still less a reward (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324. Hence it must be taken as compensatory and not to punish a defendant or even to make him a lesson for others. In *Yang Salbiah & Anor v Jamil Harun* [1981] 1 MLJ 292, the Federal Court after stating the principle and purposes of damages went on to state that 'damages must be fair, adequate and not excessive'. In doing so the court would have to address its mind to the harm, injury, damage or loss suffered by the plaintiff, not the nature of defendant's neglect, act, or omission. The plaintiff on the other hand is under a duty to mitigate the loss he suffered.

[6] Mindful of the above principles, we find judgment of the learned trial judge was in adherence. The learned judge had, at the forefront of her mind the compensatory principle and had generally conducted her assessment on that principle and other accepted principles. The learned judge further reminded herself that a claim for damages cannot be made with an objective of enriching one self.

[7] We listed below our deliberation on each of the items complained by the appellant. **A**

SPECIAL DAMAGES — CARE BY PARENTS

[8] The learned High Court judge disallowed the claim for cost of nursing care provided by the appellant's mother from birth until about two years old. Learned counsel for the appellant submitted that the learned trial judge fell into error by relying on her own personal opinion and failed to give due regard to an expert opinion on this matter as stated in *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771. **B** **C**

[9] Upon our scrutiny of the judgment we find that Her Ladyship dismissed this item of claim because she found from the evidence and the circumstantial surrounding facts, that the care for the appellant from birth to age two was not different from that of a normal child. In coming to this finding the learned judge relied on the evidence of the appellant's mother (SP3). SP3 was a kindergarten teacher. In her evidence she accounted her daily routine in caring for the appellant from birth to age two. According to her, before going to work she fed the appellant and sent her to a babysitter at 7.30am. Upon her return from work at 2 pm she took the plaintiff home, fed her again and put her to sleep and carried out her normal routine. The evidence that the babysitter had taken care of the appellant with three other babies supported the learned judge's finding. Furthermore, besides doing her babysitting, the babysitter also baked *kuih* which she placed at a shop nearby to supplement her income. **D** **E** **F**

[10] When asked during cross-examination if she would have otherwise brought the appellant with her to her kindergarten, SP3 said even if the appellant had been a normal child she would only bring her along to her kindergarten upon reaching age 5 or so. SP3 also agreed that the cost of taking care of the appellant during such infancy would be the same as that of an ordinary child. Clearly, the learned judge had good ground in making her finding by relying on the direct evidence of the appellant's mother who cared for the appellant. **G** **H**

[11] We do not find any error in the learned judge's analysis of the evidence on this issue. We agree with the learned judge that she could not have forsaken the mother's own evidence and to rely on an expert evidence which in any event, is purely an opinion. We have no reason to disturb a finding of fact by the learned judge as she had the audio-visual advantage of hearing the appellant's mother accounting her real life experience in taking care of the appellant in person. On the other hand, the expert opinion on such a subject would be a mere opinion which the learned judge was not bound to accept, especially so in **I**

the face of the mother's own experience. In our view the evidence relied by the learned judge is the best evidence before her. We have no reason to disturb it as we find the learned judge employed the right test enunciated by the Federal Court in *Yang Salbiah* in dismissing this claim. The learned judge adhered to the principle of reverting the appellant's position to that which she would have been without the negligence.

PRE -TRIAL DAMAGES — NUTRITONAL FOOD

[12] The appellant's claim for nutritious food at RM400 per month for 44 months was likewise dismissed by the learned trial judge based on two main reasons. First, in our view Her Ladyship correctly observed that it has always been the duty of parents to provide nutritious food to their children and there was no expert finding that the appellant required extraordinary food. Secondly, the evidence of the appellant's mother (SP3) who said the appellant is fed with a normal diet, except that it had to be blended to make it soft. She would normally send the appellant's food together with the appellant to the babysitter who then needed to warm it before feeding the appellant. We therefore agree with the learned judge that this item of claim should be dismissed.

MULTIPLIER AND MULTIPLICAND

[13] Learned counsel complained of the multiplicand of 20 used by the learned judge in the award of some of the items for future damages. On the issue of multiplier, we note the expert evidence on life expectancy of the appellant which was said to be between 30–40 years. Learned counsel contended that the benefit should lie in favour of the appellant and the learned judge should have taken 40 as the age. Taking 40 as the age and deducting the age at trial which was five, would give us 35. Thus applying the normal practice of deducting 1/3 the multiplicand of 24 should have been used by the learned trial judge. It was submitted that the learned judge fell into error in taking life expectancy of 36, taking into account the middle point of 30 to 40 because there is no principle in law that requires the learned judge to do so.

[14] We agree with the learned senior federal counsel's (SFC) submission for the respondent that the testimonies of rehabilitation experts (SP4 and SD1) on the life expectancy were pure estimates since there are no statistics on Malaysian experience. The statistics relied upon by the experts in providing the estimate were based on the European experience.

[15] In the circumstances, we agree with the submission by the learned SFC that it was not wrong for the learned judge, on the facts before her, to estimate the life expectancy within the range. It must also be noted that the estimate by the appellant's own expert SP4 also did not confirm if the case of cerebral palsy

treated by him was one that occurred at *intrapartum* like in the present appeal. As such we do not find error in the multiplier of 20 used by the learned trial judge and we have no reason to disturb the same.

FUTURE DAMAGES

[16] Learned counsel for the appellant contended that, as a result of the use of 20 as the multiplicand instead of 24, the claim for future damages was lessened by four years. This resulted on the claim for some of the items, for future damages to be manifestly low. There were some items of claim for future damages which were dismissed or not granted in full by the learned judge, which the appellant appealed upon as listed below.

Future Claim — Medical Care

[17] Under this head of claim the appellant sought for cost of treatment at a private hospital. The learned judge allowed a claim at RM1,033 per year as opposed to the amount of RM4,200 per year as claimed by the appellant. Learned trial judge found that the medical attention required by the appellant would be in the area of physiotherapy and rehabilitation. She noted that such services would be available at the public hospital which the appellant being categorised as 'Orang Kurang Upaya' would be entitled to get. The reason given by the father for not pursuing the treatment at the public hospital was because of long waits and according to the learned judge this was not sufficient proof of non access. This was because the father had only made one attempt to obtain service at Sungai Buloh hospital which would not justify the choice for private hospital treatment. The learned judge further took into account that the appellant's father, a retired teacher, would be able to obtain the facilities provided by the public hospital and would not justify him choosing private hospital for treatment.

[18] We find, in assessing this head of claim, the learned trial judge had already taken into account the increasingly better medical services found in the public hospitals, the fact that there was no evidence to show that the appellant was denied treatment at public hospitals, and then proceeded to allow only 1/3 of the claim. This is in line with the principle laid down in *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465 and *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785. This court in *Gleaneagles Hospital*'s case had granted 1/3 of the amount claimed based on the rate charged by private hospitals on the reason that a patient has an option to seek treatment at either a public or a private hospital.

[19] In this regard we are not persuaded by the submission of learned counsel

for the appellant that the award is not consistent with s 28 of the Civil Law Act 1956, and that the provision and availability of public medical services are not mandatory on the Government as there is no legislation to compel such services. Hence this may lead to uncertainty. We are unable to agree with that argument. Public medical services are available mandatory or otherwise. We therefore find the order of the learned judge is in line with current practice.

Future Claim — Equipment

[20] Learned counsel submitted that there were testimonies of three experts, Dr Balwant Singh Bains (SP2), Dr Lydia (SP4) and Dr Chern (SD1) on the need of equipment for the appellant. At the end of the day the learned trial judge accepted and was guided by Dr Chern's recommendation and awarded a sum of RM136,000 for the claim of future equipment.

[21] Learned counsel submitted that the learned judge fell into error in not considering the recommendation of both Dr Lydia's recommendation totalled to RM3,260 together with the recommendation of Dr Bain of another RM225,600. The award of the learned judge under this head of claim was said to have fallen short of RM415, 600 because the total recommendation by Dr Lydia and Dr Bain was RM551,600

[22] Learned counsel submitted that, the learned judge fell into error for ignoring the recommendation of Dr Lydia and Dr Bain and for giving preference to the recommendation of Dr Chern. Again even on Dr Chern's recommendation the learned judge did not allow the amount on repairs and renewals.

[23] It was further submitted that Dr Chern was not an independent expert witness because she came from the same department as the tortfeasors. Relying on 'The Guidelines of the Malaysian Medical Council 002/2006' learned counsel contended that Dr Chern should not appear as an expert witness. Learned counsel further cited decision of High Court in *Ramanaidu a/l C Simansalom v Kerajaan Malaysia & Ors* [2011] MLJU 1199

[24] The learned trial judge is assessing this item of claim had already scrutinised the proposals by all the three expert witnesses on the type of equipment required by the appellant by taking into account factors such as the physical built, the living condition and home environment as well as the mental state of the appellant to conclude that the proposal made by the respondent was reasonable. In this regard the learned trial judge analysed the proposed equipment and questioned herself on the need of the equipment as proposed by the appellant through the expert witnesses. In her finding she made the following observation:

saya menimbangkan keupayaan plaintif untuk menggunapakai semua peralatan yang disarankan. Rumah plaintif adalah rumah teres satu setengah tingkat. Saya berpendapat tiada keperluan untuk plaintif untuk naik ke tingkat atas menggunakan perkakas yang disarankan. Tahap perkembangan mental kanak-kanak tidak dibuktikan. Oleh itu sama ada plaintif boleh menikmati dan menghargai apa yang ada di ruang atas tidak buktikan. Apa yang saya dapati ialah hujahan defendan mengenai peralatan yang dipelukan oleh plaintif adalah lebih menasabah, bersesuaian dan lebih praktikal untuk kegunaan seorang yang mengalami kecederaan seperti plaintif.

[25] We find that the order made by the learned judge was well reasoned and we did not find any error by the learned judge in coming to her conclusion on this item.

Future Claim — Maid

[26] The claim for the services of two Filipinas to care for the appellant was found to be excessive by the learned trial judge. The claim was for RM27,000 per year at RM1,500 per month x 1 1/2 maids. The learned judge found that the help of an Indonesian maid would be more appropriate and less expensive. The learned trial judge in our view made correct inference that there would be no necessity for two maids to care for the appellant relying on her own assessment and looking at the appellant in court. She found the appellant's physique would not pose any difficulty in handling as the appellant only weighed 9kg at age of six years. She found the appellant would not be active like a normal child and hence there would be no reason why two maids would be required. She was also correct in her analysis that in fact two maids would be a problem logistically.

Future claim — Care and parent's stress

[27] The learned judge explained that the award she made for cost of future care by the parent at RM300 per month was premised on 1/3 of the amount claimed at RM800 per month. The principle of granting 1/3 claim for future cost is an acceptable principle for future award of future damages (see *Chai Yee Chong* and *Gleaneagles*).

*Future Claim — Training and education for care give*r

[28] The learned trial judge did not allow the claim for training for the care provider because she did not find any need to do so. In her observation the appellant's mother who was a kindergarten teacher would be able to guide the care provider. We agree with the learned trial judge that the mother would

provide the best way to care for her own child, normal or otherwise. For that, we did not find any error on the part of the learned judge in dismissing this item of claim.

[29] The learned judge also dismissed this item of claim as she found no necessity for the training in view of the parent's experience. Furthermore free trainings of this nature is available at public hospitals where it is accessible to the appellant's parent to benefit from.

Future claim — Respite care

[30] In her judgment the learned judge dismissed this claim for want of proof. We agree with the learned trial judge that this claim should be dismissed. The learned judge noted that respite care would be normally left to close family members as testified by SP4, taken into consideration the Asian family tradition. Furthermore the appellant had been granted cost of hiring maid to assist. We agree with the learned SFC that the reliance made by the appellant on the case of *Aaliyah Syahril Rizal* is totally misplaced because in that case the cost of respite care was granted by consent of parties.

Future claim — Disabled vehicle

[31] It was the contention of learned counsel for the appellant that the award given by the learned judge for future cost of purchase and repair and maintenance (ie petrol, roadtax & insurance) of a disabled friendly vehicle was manifestly low. The appellant claimed the cost of vehicle at RM122,000 with vehicle replacement every seven years at RM17,428 per year. The learned trial judge awarded RM89,000 as a one-off purchase for 20 years at RM4,450 per year.

[32] In her judgment Her Ladyship found the item of claim as proposed as *terlalu tinggi dan melampau*. The car model suggested by the appellant according to the learned judge was of luxurious class. She found the proposal by the respondent more appropriate in the circumstances and allowed the claim as proposed by the respondent. We see no reason to disturb her assessment relying on *Yang Salbiah*.

Future claim — Clothings/disposable diapers etc

[33] The appellant's claim was in the sum of RM500 per month for future cost of special clothes, diapers and creams. On evidence the learned judge found that the more relevant need of the appellant would be the disposable diapers. The learned judge then proceeded to award the damages for the cost of

diapers at RM140 monthly or RM1,600 per year. We do not find error in the exercise of Ladyship's discretion on this item relying on the evidence and the factual circumstances of this case.

Future — Pain and suffering from surgery

[34] The claim of the appellant was premised on the recommendation by the expert Dr Lydia that the appellant may require orthopaedic surgery due to left hip dislocation. Such surgery would cost RM50,000. The learned judge awarded a sum of RM25,000. It was contended that the award did not take into account the related pain and sufferings from this surgery on top and above the suffering from cerebral palsy. The learned trial judge had earlier awarded RM350,000 for pain and sufferings. In her judgment Her Ladyship said she had already factored in all the pain and sufferings of the appellant in awarding this sum. It would not be possible to assess a separate pain and suffering specific to future surgery as we find the learned judge had already assessed the pain and sufferings suffered by the appellant even if there would be a future surgery would all be resulting from the CP suffered. We agree with the learned judge as we find her reasons justified.

Future claim — Nutrition

[35] The learned trial judge dismissed this item as she found no evidence to support the contention that there is a need for any special dietary requirement for the appellant. We have no reason to interfere with the learned judge's findings of facts.

Future — Post 18 years old

[36] The appellant claimed an expenses of RM2,000 per month for future cost of accommodation and living expenses upon the appellant reaching the age of 18 years but was disallowed. The reason given by the learned judge was because in her assessment of damages she had awarded cost for modification of the house to accommodate the appellant and that she had taken into account the life span of the appellant.

Future claim — Holidays

[37] The learned judge dismissed this claim as she found that cost of holiday is not peculiar to the negligence of the respondent as it is a cost that a family would have incurred in any event. Furthermore the learned judge found that this item of claim has never been awarded by the courts. The reliance placed by the appellant on a case that is decided by way of consent is totally misplaced. The Federal Court also dismissed the same item of claim in the *Gleanegle's* case on 7 August 2014 (see W-02–2662–10 of 2011 and W-02–2661–10 of 2011).

A COSTS

[38] The appellant was dissatisfied with the costs awarded by the trial judge in the sum of RM100,000. We note that in the written submission by the appellant's counsel at the High Court (at p 873) learned counsel sought for a sum of RM115,000 as costs on liability proceedings being RM100,000 as getting up fees and RM15,000 as out of pocket expenses. From the appeal records the proceedings on damages were held for five days.

[39] It was submitted that because the respondent had only agreed on the issue of liability on the day of trial despite repeated proposals made by the appellant, the full costs should be awarded. The appellant also contended that the costs awarded deviated from the trend and principles regarding costs for medical negligence suit. Before us learned counsel submitted that, before trial he sought for a total costs of RM115,000 on liability. After trial the appellant further incurred RM30,000 as out of pocket expenses and sought for a reimbursement of the same.

[40] We agree with the learned trial judge that though the agreement on liability took place only on the day of trial, it had no doubt lightened the burden of the appellant and the appellant's counsel and shortened the days of trial. The learned trial judge took into account the fact that the same expert witnesses would have been involved if the trial on liability had proceeded. In our view she had exercised her discretion properly under O 59 of the Rules of Court 2012 and had taken into account the relevant facts in awarding the sum of RM100,000. We do not find any good reason to disturb her exercise of discretion as the issue on costs remains a discretion of the trial judge.

[41] In conclusion, having perused through the award of damages, we are of the view that the total damages awarded by the learned trial judge must also be taken as a whole instead of particularising it item by item because even if one item appears to be too low there are areas where the trial judge may be more generous. For this reason also we are constrained to interfere with the findings unless they were made premised on wrong application of legal principle or an exercise of discretion without factual or legal basis.

[42] Having analysed each of the items raised on appeal, we are of the considered view that on the facts and circumstances of this case, the award of damages was correctly made relying on accepted legal principles and normal practice. We therefore dismissed the appeal of the appellant and we make no order as to costs.

Appeal dismissed.

Reported by Ashok Kumar